

## **DISPUTE REVIEW BOARD REPORT AND RECOMMENDATION**

**US 50 - McCulloch Blvd. to Wills Blvd.**

**Pueblo, CO**

**CDOT PROJECT NO. FSA 0503-081**

### **DISPUTE #3 CONCERNING Night Work**

**Hearing Date:** January 5, 2017

**Hearing Location:** CDOT – Region 2 Creekside Conference Room  
902 Erie Avenue, Pueblo, CO 81001

**Party Attendees: Tony J. Beltramo and Sons Incorporated**

Tim Beltramo - Project Manager

Alan Thorson – Superintendent

**CDOT**

Dan Dahlke - Resident Engineer

Dean Sandoval – Project Engineer

Michael Aguirre - Assistant Project Engineer

### **Background**

On December 17, 2014 Tony J. Beltramo and Sons Inc. (Contractor) was awarded a Contract by CDOT for \$ 9,838,465.70 for the widening of the eastbound roadway, widening of a bridge structure, drainage work and HMA pavement on US 50 from McCulloch Blvd. to Wills Blvd. in Pueblo, CO. A Notice to Proceed was issued on January 15, 2015.

Section 8 of the Contract incorporates the Plans, the Standard Specifications for Road and Bridge Construction dated 2011 and any Special Provisions for this Project and Revised Standard Specifications.

On July 17, 2016, the Contractor sent a letter to CDOT stating it was instructed by CDOT that no lane closures could occur during the day between 6am to 6pm along HWY 50 and that this directive was and continues to be a change to the Contract scope.

The Contractor submitted a Request for Equitable Adjustment (REA) for night work on September 26, 2016. On October 19, 2016 the Project Engineer (PE) denied the request for additional night work; however, the PE stated that the Department would honor the previous verbal agreement to provide compensation for extra work and phase changes, added after Award of the original Contract, which required night work. On October 20, 2016, the Contractor gave notice to the Resident Engineer (RE) that it disagreed with the PE's denial of its REA.

Since the parties were not able to settle the dispute, both parties requested a DRB Hearing on merit on November 15, 2016.

### **Joint Statement of the Dispute**

This dispute is a contractual dispute relating to working hours and lane closure restrictions.

It is Tony J. Beltramo & Sons, Inc. stance that, based on the contract documents, working hours for the project were 7:00 am to 7:00 pm weekdays, so they are entitled to extra compensation for having to work many nights.

It is the CDOT's stance that the contract documents were sufficient to determine that some night work might be required and, if so, additional costs associated with working nights are the responsibility of the Contractor.

The purpose of the dispute hearing is to determine whether there was, or was not, sufficient information and guidance provided in the contract documents to readily determine that night work might be required for this project. That resolution will help to determine whether quantum is warranted.

If quantum is warranted, a determination will need to be made to differentiate work that is considered to be the CDOT's responsibility and work that is Tony J. Beltramo & Sons, Inc. responsibility.

### **Pre-hearing Submittals**

Both parties provided the DRB with Pre-hearing Submittals per Subsection 105.23(e) which included, but were not limited to, documentary evidence relevant to the issues. The DRB had previously been provided with copies of the Plans and Specifications. Both parties provided the DRB with their lists of attendees. The DRB requested that a copy of the Region 2 Lane Closure Strategy be available at the hearing.

### **Summary of Contractor Presentation on Night Work**

CDOT directed the Contractor to work nights which amounted to 48 nights. The bid was based on:

- Project Special Provision: Revision of Section 108 – Prosecution and Progress that states, *The Contractor shall establish daily working hours, Monday through Friday during daylight hours, for the project and submit them to the Engineer for approval along with his Progress Schedule.*
- The Traffic Control Plan under Special Traffic Control Plan Requirement 10 states, *The Contractor shall perform work Monday thru Friday, 7 am to 7 pm, unless otherwise approved by the Engineer.*

If night work was required, why wasn't it stated in the Contract Documents?

CDOT Form #1389 - Project Showing Questions and Answer Details which were provided to the bidders contained the following:

- Source of Question: Martin Marietta – Pueblo

Question: Can we do night work for top mat HMA installation?

COOT Response: Yes. It is anticipated that night work **may be required** (emphasized by Contractor) and must follow the R-2 Lane Closure Policy requirements. Any costs (lighting, TCS, etc.) incidental to working nights will be the responsibility of the Contractor.

- Source of Question: Tezak Heavy Equipment

Question: Can the Contractor work from 7:00 am to 7:00 pm?

CDOT Response: Yes. See the special provisions, Revision of 108-Prosecution and Progress and Traffic Control Plan – General. Note 10 for Traffic Control Plan – General states that the Contractor shall perform work Monday thru Friday between 7:00 am and 7:00 pm, unless otherwise approved by the Engineer.

- Nowhere in any of the Q & A's does it say night work would be required.

CDOT knew at bid time night work would be required and should have said so in the Contract Documents. The Contractor had to pave at night six times and also had to stripe and move barrier at night.

No hard copy of the Region 2 Lane Closure Strategy was provided at bid time and the link listed in the Traffic Control Plan did not work. (Tim put the link in his cell phone and got a reply “This page does not seem to exist...”) (Dean noted that the link to the Strategy did work but that the link went to the CDOT library and you needed to search for the Region 2 Lane Closure Strategy.) Tim noted on the new US 50 job that there was a new link which does work.

The Contractor was not prepared to work nights and the requirement to work 48 nights changed the whole job. The Escrowed Bid Documents would show it did not have costs for night work. The Contractor's Method Statements, which were included in its REA, showed it planned to work from 7:00 a.m. to 5:00 p.m. CDOT approved the Method Statements.

In more recent jobs, CDOT has stated when night work is required. This Contractor (Beltramo) does not normally bid projects requiring night work.

### **Summary of CDOT Presentation on Night Work**

The Plans and Specs refer to the Region 2 Lane Closure Strategy. Based on seven roadway segments and lane directions, the day of the week and the season, there are 42 different lane restrictions to consider. Not one bidder asked about the Strategy even though it was mentioned at the Project showings.

Note: CDOT tried to handout the Appendices from the Region 2 Lane Closure Strategy. Since only two Appendices were included in the Pre-hearing Submittals, any others were new information. The Contractor was asked to review the handout at a recess and let the DRB know if it objected to the introduction of the documents by CDOT.

Spec Section 105.09, Page 60 gives the Order of Precedence for the Contract Documents. The highest precedence is given to Project Special Provisions. Project Special Provision 108 calls out when the contractor can work. Region 2 Lane Closure Strategy was referenced in the Contract Documents. There are other documents that are only referenced in the Contract Documents that were not included in the Bid documents such as the Materials Manual and M & S Drawings. Project Special Provision 108 specifies when the contractor can work and has nothing to do with lane closures. The work hours can change. The Contract time ended up at 393 days. Depending on the number of days where work was done at night (42 or 48), only 11 to 13 % was night work. This does not make the job a night job. Five lanes were worked on but only one was at night. This was primarily a day job but had to be built using the Region 2 Lane Closure Strategy.

The web link for the Region 2 Lane Closure Strategy was in the Contract Documents but the Contractor did not ask for a copy until it was 17 months into the job. Not one contractor asked for the Strategy during the bid period. If this was a night job, it would have been called out in the Contract Documents. The Traffic Control Plan (TCP) does not require night work but refers to the Region 2 Lane Closure Strategy.

TCP Item 12 states, *The Contractor shall not be allowed to have a lane closure at any time in excess of one-half mile in length and impacting any more than one public road intersection unless otherwise approved by the Engineer.* CDOT tried to help the Contractor out where it could and allowed longer lane closures. A daytime closure was tried and it ended up in a traffic disaster and raised safety concerns. US 50 is a high volume state highway and work is normally done at night in lanes requiring closure. How detailed does CDOT have to be in the Contract Documents if references are given?

At the contractor job showings by CDOT, mention was made of some night work. The Contractor added four phases to the Project Phasing Plan due to problems with its bridge subcontractor. Times for lane closure restrictions are shown in the Region 2 Lane Closure Strategy. Common industry practice is for traffic signal work, phase shifts and barricade work to be done at night due to traffic. The lane closure requirements were clear to CDOT.

CDOT split the work at the ramps and there were some pipe crossings that were done at CDOT's request. In some cases, all Project phases were worked on at the same time. Some of the night

work could have been reduced. CDOT did not require the Contractor to get stamped PE drawings for the phase changes. The Project called for some pipes to be removed but CDOT allowed the Contractor to plug the pipes in order to keep lanes open.

Dean said he and Tim talked early on about night work but Tim never gave an indication there were costs involved until he sent the letter in the summer of 2016. The problems with the bridge subcontractor caused major problems on the job.

All that CDOT has to rely on are the Contract Documents. If CDOT specifies times, the contractors will add money to their bid. Region 2 Lane Closure Strategy is referenced in the Contract Documents. CDOT agreed to pay for night work when work was added and had to be done at night. CDOT has learned for future jobs and the web link is now direct to the Region 2 Lane Closure Strategy. CDOT had to set the work hours and considered this a daytime job. Only 11% of the time was at night and CDOT feels the night time work could have been reduced and some night work was due to the bridge subcontractor. The Contract Documents are clear when lane closures are permitted.

### **Contractor Rebuttal**

There are a lot of things in the Contract and some are hidden points like the Region 2 Lane Closure Strategy. CDOT referred to Project Special Provision - Revision of Section 108 but there is nothing in the Revision that states anything about night work. It only states, ... *all work performed by the Contractor or any of the Contractor's agents during a working day shall be accomplished within these pre-established working hours - (Monday through Friday during daylight hours).*

A utility crossing was tried during the day and backed up traffic. The public and a County Commissioner called CDOT to complain and CDOT then said it had to work at night. CDOT allows a lane closure on I-25 during the day and it's busier than US 50. There are 30,000 people in Pueblo West and many use US 50 every day. CDOT should have considered this before the bid and not after the Project started.

CDOT said there are 42 separate lane requirements in the Region 2 Lane Closure Strategy. The Contractor has been awarded another job on US 50 in this area and the documents stated there would be night work.

Work in the median affected the westbound traffic but this is not covered in the Region 2 Lane Closure Strategy. The Contractor used a metal barrier which saved 10 days and helped the phase changes.

CDOT said the Contractor waited 17 months to bring up the problem. Up until that time they had worked together to solve problems but were then directed to work nights. Weather delays and Project changes extended the job. Some work basically became night work. Beltramo had to shut down other operations of the company because of their small size in order to provide personnel for the job at night.

CDOT said the night work was required for safety but the night work was required because of complaints from the traveling public. Night work is not as safe as day work. Pueblo West is the marijuana capitol and there is a lot of drinking at night. Cars didn't observe the 35 MPH speed limit – they were going 50+. It is not as safe at night as it is during the day. Night work also creates substantial cost impacts.

Why wasn't night work covered in Section 108 and the TCP? The next job CDOT put out noted the night work. CDOT was wrong on Dispute #1 and the Contractor was wrong on Dispute #2 per an independent tester but they worked things out.

The Phasing Plans were not as safe as the way the phasing was actually done. The Region 2 Lane Closure Strategy is not applied consistently across other Region 2 projects. Complaints to CDOT drove the decision to require night work.

Tim said at past job showings any discussions are usually put in the Q&A.

The pipe work was much less productive at night plus there were more costs with subs that did not include any night work except for the traffic signals.

To sum things up, there was too much traffic during the day when they planned to work and, as a result, CDOT directed them to work at night.

### **CDOT Rebuttal**

The new US 50 job is a block long which is much different.

The Phasing Plan had two lanes open in each direction at all times with work behind barriers and more barrier was added.

In the Contractor's rebuttal, Section 108 was brought up concerning work times. The Region 2 Lane Closure Strategy is a safety requirement. The job was not a night job as most of the work was done during the day.

Anything at the showing is "hear say" unless it's in the Q&A. Night work was mentioned at the job showings. The Special Provisions rule. Why were there no questions at bid time about the Region 2 Lane Closure Strategy?

CDOT feels it was clear what was required in the Contract Documents. What is required for a "perfect" set of Plans and Specs?

### **Discussions by Parties**

1. Tim said he didn't hear anything about night work at the showing and Dean might have mentioned it to Bobby (Beltramo?). Dean said that might have been the case.

2. The Contractor said CDOT said the new job on US 50 was only a block long. The job is actually a half mile long and is at US 50 and Wills.
3. Tim said he tried the link in the Spec for the Region 2 Lane Closure Strategy and could not get it. He objected to the handouts that CDOT tried to handout earlier in the hearing because the only thing CDOT had included in CDOT’s Pre- hearing Submittal were two sheets from the Appendix. Tim had not seen the Strategy until 17 months into the job. CDOT said they brought the complete Region 2 Lane Closure Strategy to the hearing per the DRB’s request.
4. Dan Dahlke (CDOT) admitted that at bid time the project was budget constrained, and that is why it was advertised for daytime work hours.

### **DRB Questions**

1. **To Both:** Was all night work required due to the need for lane closures?

Both parties said “yes”.

2. **To CDOT:** In the Q&A answers, why did CDOT say “night work **may be** (emphasis added) required” when CDOT knew night work **would be** required?

CDOT said that the contractor phasing plan might be such that night work was not needed. Traffic signal work is always done at night.

3. **To CDOT:** Explain how to use the Region 2 Lane Closure Strategy.

CDOT went through the flow charts and the use of the Appendices.

4. **To Both:** How did CDOT direct the Contractor that work needed to be done at night?

Both said it was by phone and verbal.

5. **To Both:** Have the escrow bid documents been opened?

Both parties said “no”.

6. **To CDOT:** The DRB would like a copy of the “blue book” Contract after the hearing.

CDOT provided the copy.

7. **To Both:** Did the phase changes require or add night work?

CDOT said that four phases were due to the sub problems at the bridge and added night work.

The Contractor said that the Phasing plan would not work at the median due to the impact on the westbound lanes. Additional barrier was added.

**8. To Contractor:** Was any night work anticipated at bid time?

The Contractor said that only traffic signal work was anticipated to be night work.

**9. To CDOT:** CDOT mentioned two lanes could be kept open by working behind barrier. Was barrier a unit price item?

CDOT said there was a unit price for up to 3,000 LF of barrier which had to be shifted as needed. More barrier was added to the Contract.

**10. To CDOT:** TCP Item 3 states, *During construction, only one lane may be closed to traffic at any time in either direction.* Explain how “at any time” agrees with the Region 2 Lane Closure Strategy.

CDOT said this means there can be no full closure of lanes. CDOT could look at it as a conflict.

**11. To CDOT:** Were Method Statements approved?

CDOT said they were approved by CDOT.

**12. To Both:** Could the job have been done during the day?

The Contractor said it could have been done during the day. You need to look at night work as a changed condition. CDOT should have made it a night job at bid time.

CDOT said night work might have been required. They tried a lane closure from 9:00 a.m. to 3:00 p.m. and had many complaints. CDOT told the Contractor to follow the Region 2 Lane Closure Strategy.

**13. To Both:** Were lane closures requested per TCP Item 11?

CDOT said requests were not submitted.

The Contractor said some changes were just worked out in the field. There are some jobs that required night work but then day work was allowed.

## **Findings**

1. CDOT Standard Specification Section 101 states, *When the Contract indicates that something “shall” (emphasis added) be done, the action is required and is not discretionary.*
2. CDOT Standard Specification Section 105.09 - Coordination of Plans, Specifications, Supplemental Specifications, and Special Provisions states:

*In case of discrepancy the order of precedence is as follows:*

*(a) Special Provisions*

1. *Project Special Provisions*
2. *Standard Special Provisions*

*(b) Plans*

1. *Detailed Plans*
2. *Standard Plans*

*Calculated dimensions will govern over scaled dimensions.*

*(c) Supplemental Specifications*

*(d) Standard Specifications*

The Contract in Section 2 – Order of Precedence contains essentially the same language.

3. CDOT Standard Specification Section 108 is entitled “Prosecution and Progress”. The Contract contained Project Special – Revision of Section 108 which states:

*Section 108 of the Standard Specifications is hereby revised for this project as follows:*

*Subsection 108.08 shall include the following :*

*The Contractor shall (emphasis added) establish daily working hours, Monday through Friday during daylight hours (emphasis added), for the project and submit them to the Engineer for approval along with his Progress Schedule; all work performed by the Contractor or any of the Contractor's agents during a working day shall (emphasis added) be accomplished within these pre-established working hours. Neither the Contractor nor any of the Contractor's agents shall (emphasis added) work during times outside of the daily working hours without written approval by the Engineer. Requests for changes in working hours shall be submitted to the Engineer in writing at least 48 hours before the proposed change in working hours would take effect. Working hours outside of these times will not be allowed unless it is necessary due to weather restrictions or to comply with safety requirements or as specified by the plans and specifications by the plans and approved by the Engineer.*

Subsection 108.08 is entitled “Determination and Extension of Contract Time”.

The Contractor complied with the above submittal requirements by submitting its Method Statements which showed Work Times: “7am to 5pm”. During the hearing, CDOT said the

Method Statements were approved.

4. Project Special Provision: Traffic Control Plan – General Item 10 states:

*The Contractor **shall** (emphasis added) perform work Monday thru Friday, 7 am to 7 pm, unless otherwise approved by the Engineer. If any night work is approved by the Engineer, all costs associated with this work, including but not limited to, lighting for the work, lighting for flagging stations, additional Traffic Control Supervisor, etc., shall not be paid for separately but shall be included in the cost of the work.*

The Contractor showed it intended to comply with the above requirements by submitting its Method Statements which showed Work Times: “**7am to 5pm**”. During the hearing, CDOT said the method Statements were approved.

5. Project Special Provision: Traffic Control Plan – General Item 20 states:

*During **non-construction periods** (evenings, (emphasis added) weekends, holidays, etc.) all work shall be adequately protected to insure the safety of vehicular and pedestrian traffic, as detailed in the Contractor's MHT. Excavations or holes shall be filled in or fenced when unattended.*

This seems to indicate that evenings (e.g. nights) were intended to be “non-construction periods”.

6. Project Special Provision: Traffic Control Plan – General Item 27 states:

*The Contractor shall not perform any work requiring lane closure on the roadway during hours lane closure is prohibited by the Region 2 Lane Closure Strategy, available at: <http://www.coloradodot.info/library/traffic/traffic-manuals-guidelines>.*

During the hearing, the Contractor said at bid time he could not connect to the link and demonstrated the same thing at the hearing on his cell phone. After the hearing, DRB input the link and got the reply “This page does not seem to exist...” The reply is included as Attachment 1 to this Report.

Project Special Provision: Revision of Section 102 – Project Plans and Other Data contains a list of 11 items of information available for review at the Resident Engineer’s office. Based on the importance that CDOT placed on the Region 2 Lane Closure Strategy, the DRB fails to understand why the Strategy was not listed in this revision rather than incorporating the Strategy by providing a web link that apparently did not provide easy access for contractors to a document that CDOT maintained was so important.

7. There is a Note in the proposed Construction Phasing Plans that states, *Maintain 2 lanes on US 50 all times*; however, TCP Item 3 states, *During construction, only one lane may be closed to traffic at any time in either direction. Traffic shall not be delayed for more than 10 minutes or as directed by the Engineer*. In accordance with the Order of Precedence listed in

Finding 2 above, TCP Item 3 controls.

8. CDOT’s response to Martin Marietta’s question, “Can we do night work for top mat HMA installation?” stated, *Yes. It is anticipated that night work **may be required** (emphasized added) and must follow the R-2 Lane Closure Policy requirements.* It should be noted that CDOT called the reference “Policy” rather than the correct title of “Strategy”. This answer, “**may be required**” is misleading since, during the hearing CDOT said *US 50 is a high volume state highway and work is normally done at night in lanes requiring closure.*

CDOT’s response to Tezak Heavy Equipment’s question: “Can the Contractor work from 7:00 am to 7:00 pm?” stated, *Yes. See the special provisions, Revision of 108-Prosecution and Progress and Traffic Control Plan – General. Note 10 for Traffic Control Plan – General states that the Contractor shall perform work Monday thru Friday between 7:00 am and 7:00 pm, unless otherwise approved by the Engineer.* Again, this answer is misleading based on CDOT’s statement during the hearing that US 50 is a high volume state highway and work is normally done at night in lanes requiring closure.

As discussed in Findings 3, 4 and 5 above, CDOT set the work times from **7 am to 7 pm during daylight hours**. Although TCP Item 27 refers to the Region 2 Lane Closure Strategy, **the Specifications and the Strategy reference are in conflict** and CDOT’s answers to the contractors’ questions further promoted the conflict and ambiguity.

9. CDOT’s position was that the daytime lane closures resulted in a safety issue for the traveling public. The Contractor maintained that night work, coupled with the possible impact from drivers who had been driving under the influence of drugs and/or alcohol and failing to observe the speed limit, resulted in a safety hazard for workers on the job. Based on the hearing, it appears the main reason that CDOT required night work was not for safety reasons but rather to placate the traveling public and reduce complaints concerning delays.
10. Based on the above findings, it is the DRB’s position that the Contract Documents clearly required the Contractor to work **daylight hours, Monday thru Friday between 7 am and 7 pm**. The referenced Region 2 Lane Closure Strategy, which was not easily accessible, is in conflict with the **non-discretionary work hours and caused an ambiguity in the Contract**. Furthermore, CDOT could have been much clearer when answering bidder questions and in qualifying when the lane closure referenced in TCP Item 3 could be used. **Accordingly, CDOT’s requirement that any lane closures be done at night is a Significant Change in the Character of the Work.** CDOT Standard Specification Section **104.02(c)** states:

*The term “significant change” shall be construed to apply only to the following circumstances:*

- (1) *When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction.*

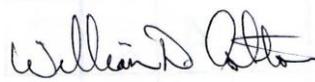
**Recommendations:**

1. Due to the conflicts/ambiguities in the Contract Specifications and Contractor problems in easily accessing the Region 2 Lane Closure Strategy, the direction by CDOT to perform some work at night is a Significant Change in the Character of the Work. If the parties agree with the DRB Recommendations, they should discuss an adjustment to the Contract in accordance with Specification Sections 104.02(c) or 104.03. If the parties cannot agree on the method of adjustment or the cost adjustment (quantum), the parties can request a DRB hearing to resolve the dispute.
2. If some work needed to be performed at night solely due to the problems with the bridge subcontractor and not due to CDOT’s direction to work at night, any related costs should not be included in the adjustment to the Contract as discussed in Recommendation 1.
3. The following is offered by the DRB for the parties’ consideration and had no bearing on the Findings and Recommendations. The DRB is required to make its Findings and Recommendations based on the Contract that was signed by the parties. However, there is clearly an ambiguity in the Contract between the specified working hours of **daylight hours, Monday thru Friday between 7 a.m. and 7 p.m.** and the times lanes could be closed as described in the **Region 2 Lane Closure Strategy**. The DRB is not giving legal advice but suggests the parties, if needed, consider the following:
  - Unless the non-drafting party knew or should have known of the ambiguity, the risk of ambiguities in contract language is generally allocated to the party responsible for drafting the contract document.
  - The owner has an implied duty to disclose information that is vital for the preparation of estimates or for contract performance.
  - The theory of implied warranty of the specifications allocates the risk to the owner when the specifications it furnishes are not suitable for their intended purpose.

Respectfully submitted this 26th day of January 2017.



Champney A. McNair, Jr.



William D. Ashton



W. H. Hinton II

ATTACHMENT 1

<https://www.coloradodot.info/library/traffic/traffic-manuals-guidelines>



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